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DISQUALIFICATION OF JUDGES.

There is no sounder or better established principle of law than the one which forbids a man to be a judge in his own cause or in one in which he is interested. The maxim has been embodied by the Indian legislature in S. 17 of the Madras Civil Courts Act (III of 1873) and in S. 555 of the Criminal Procedure Code (Act X of 1882). The former enactment provides that no District Judge, Subordinate Judge, or District Munsiff shall try any suit to or in which he is a party or personally interested, or shall adjudicate upon any proceedings connected with or arising out of such suit and that no District Judge or Subordinate Judge shall try any appeal against a decree or order passed by himself in another capacity. The latter provides that no judge or magistrate shall, except with the permission of the court to which an appeal lies from his court, try or commit for trial any case to or in which he is a party or personally interested, and no judge or magistrate shall hear an appeal from any judgment or order passed or made by himself. An explanation is appended to this section that a judge or magistrate shall not be deemed to be a party to, or personally interested in any case, merely because he is a municipal commissioner. Whether a judge is directly a party or not to a case is a matter capable of an easy answer and it is unnecessary to dwell upon this part of the rule. In what cases a judge should be regarded as personally interested is more difficult of determination, as the question is essentially one of degree. The interest of the judge may be of all kinds of shades, may vary from the close interest which is practically indistinguishable from the case in which he is a party to the remote and shadowy interest which is altogether unlikely to influence his decision. The question is

originally one of pure fact to be determined with reference to the circumstances of each case; but as in the case of other questions of fact which harden into questions of law, particular classes of facts are found in course of time to have greater influence upon the impartiality of the judge than others, generalizations are made of these and legal presumptions are drawn from their existence which subsequently crystallize into rules of law. Once a hard and fast rule of law has been formed, the courts refuse to enquire whether the presumption which gave rise to the rule holds good in the particular case or not. We may illustrate our statement by referring to the rule that pecuniary interest however small disqualifies a judge. The interest may be so small as not to be likely to influence any judge, but it will have none the less the effect of disqualifying the judge and the courts will decline to perplex themselves with the question of the amount of such interest. We shall thus find that though the question is one of degree, there are some rules on the subject which can be definitely formulated. Before proceeding to state the rules however, it may be premised that there is practically no difference between the Indian and the English Law on this matter. The *personal interest* spoken of in the Indian Acts must be taken to include cases of *pecuniary* interest also from which it is contradistinguished in the English decisions. If there is one principle better established than any other, it is that pecuniary interest however slight in the result of a cause disqualifies the judge. The leading case on the point is the case of *Dimes* v. *Grand Junction Canal,* 3 H. L. C, 759 in which the decision of the Lord Chancellor was set aside on the ground that as a large shareholder in the plaintiff company he was interested in it and therefore disqualified. In *Esdaile* v. *Lund,* 12 M & W, 73, in a *scire facias* by the plaintiffs as trustees of a banking company, the plaintiffs having obtained a rule for a special jury, the court made them undertake to strike out of the list of special jurors any who might be shareholders in the banking company. In *Queen* v. *Recorder* of *Cambridge,* 8 E. & B, 643 the Recorder reduced the rate upon certain rateable property and allowed costs. The costs were taxed by the recorder and reduced by him. But the formal order was drawn up at the sessions at which the Deputy Recorder presided. The order was quashed on the ground that the Deputy Recorder had a personal interest in the result

because the costs would be paid out of the common fund to which the parish where he was an occupier would contribute. The principle has been stated in similar terms in various cases. See the *Queen* v. *Rand,* L. R, 1 Q. B, 230, 232; The *Queen* v. *Farrant,* 20 Q. B. D, 58. Though small however the pecuniary interest which disqualifies a judge must be direct and certain and not remote or contingent, see The *Queen* v. *Manchester, Sheffield and Lincolnshire Railway Co.,* L. R, 2 Q. B, 336, 339. In this case at the time of the summoning of a jury and the taking of an inquisition before the sheriff as to the amount of compensation to be paid for land taken by a Railway Company, under the powers of their act of parliament, there was an executory agreement not yet carried out by which that company would ultimately become amalgamated with another Railway Company in which the sheriff was a share-holder. The interest of the sheriff therefore in the former company was held to be too remote and contingent to disqualify him. Where a judge is pecuniarily interested in a cause, he is disqualified from trying not merely that particular cause but also other causes of an identical nature which have to be tried at the same time under circumstances which render it likely that his decisions in those other causes would be influenced by the view he would naturally take in his own. Thus in the *Queen* v. *Justices of Great Yarmouth,* 8 Q. B. D, 525, at a special sessions for appeals against a poor rate, the chairman of the magistrates who was himself appellant in one of the cases for hearing, took part in the decision of the cases except his own and when his own case was called on, he left the Bench and went to the body of the court, and conducted the case himself. As the chairman was a litigant in a matter similar to the other matters before the court, it was held that he was disqualified from acting as justice and that the orders were all bad.

The interest which disqualifies a judge is not confined to pecuniary interest, but may be of a personal kind as it is called in the English cases (See *Government of Bengal* v. *Hiralall Dass,* 8 B. L. R, 422). Personal interest may arise from all the various situations or relations in life which are reasonably likely to affect the impartiality of a judge. While in the case of pecuniary interest, the question of more or less is altogether immaterial,

it is important that personal interest other than pecuniary should be of such a substantial character as to make it likely that the judge would have a bias, see the *Queen* v. *Farrant,* 20 Q. B. D, 58. Wherever there is a likelihood that the judge would from kindred or any other cause have a bias in favour of one of the parties, it would be very wrong in him to act, but circumstances from which a suspicion of favour may arise do not produce the same effect as a pecuniary interest (*Per Blackburn, J.* in the *Queen* v. *Rand,* L. R, 1 Q. B, 230, 232). The reason for such a distinction between the two kinds of interest is clear. While the number of cases in which a judge is pecuniarily interested is likely to be small, it would be impossible to circumscribe the various relations of kinship, and social and political relations in which a judge may be placed to other persons, and to disqualify a judge on the ground of the bare possibility of bias which any one of these relations may produce would be to render the administration of justice impossible. Certain of these relations however have been held to give rise to a substantial interest and therefore disqualify the judge. The marital relation is one of these and a judge will be considered disqualified for the trial of a cause to which his wife is a party. In *The Queen Empress* v. *Sahadev,* I. L. R, 14 B, 572 where the accused was convicted of rash and negligent driving for passing a dog-cart driven by the magistrate's wife, the conviction was quashed on the ground that the magistrate was personally interested and therefore disqualified. In the same way a father or son would, we think, be held disqualified to try a case in which the other was a party. Care must be taken however not to push this principle of disqualification too far, as the whole world may be proved to be kin. It is not possible to lay down the exact limits within which kinship should be held to disqualify and each case must be decided with reference to its circumstances and the normal feelings of attachment among the class of people to which the judge belongs towards relations of the degree in question. The fact that a magistrate is the master of the complainant has been considered not to deprive the magistrate of his jurisdiction, though it is expedient that such complaint should be referred to another magistrate. (*In re the petition of Basapa,* I. L. R, 9 B, 172). If the relationship had been reversed and the complainant or the accused had been the master or superior of the magistrate, the decision would have been different. In *Wood* v. *The*

Corporation of Calcutta, I. L. R, 7 C, 322, a conviction by a magistrate for a Municipal offence was set aside on the ground that the magistrate was a servant of the complainant municipal corporation, see also *Nobin Krishna Mookerjee* v. *The Chairman of the Suburban Municipality*, I. L. R, 10 C, 194.

The relation of prosecutor and prosecuted is a source of the keenest interest and has been justly considered to be incompatible with the neutrality required of a judge. In *The Queen* v. *Milledge*, 4 Q. B. D, 332, two of the justices who heard a summons for the abatement of a nuisance were members of the town council which took out the summons. There were six justices and an order for abatement was made by a majority of four against two, the justices objected to being among the four. The order was reversed on the ground that the justices practically made an order in a case in which they were prosecutors. In *The Queen* v. *Lee*, 9 Q. B. D, 394, a conviction by a bench of four justices was set aside on the ground that one of them was a member of the sanitary committee of the town council and had been present at the meeting in which the resolution directing the prosecution was passed. In *The Queen* v. *Boidnath Singh*, 3 W. R, Cr, 29 it was held that a Deputy Magistrate should not act as a Magistrate in cases in which he is himself the prosecutor and take the confessions of prisoners before himself. In the case of *Het Lall Roy*, 22 W. R, 75 a District Magistrate who had taken an active part in the prosecution of the prisoners and recorded the evidence of the material witnesses preliminary to deciding whether the case should go to trial or not and by whom it should be tried was held incompetent to hear the appeal from the conviction in the case. Where an officer is primarily responsible for the prosecution of offences against any enactment, he should not himself try as a magistrate a person charged with such an offence, (see *The Queen* v. *Nadichand Poddar*, 24 W. R, 1, *Empress* v. *Gangadhar Bhunjo*, I. L. R, 3 C, 622, and *Empress of India* v. *Deoki Nandan Lal*, I. L. R, 2 A, 806). It is unnecessary to multiply authorities in support of the general rule, but it may be useful to explain the limitations to it. One limitation is that where the prosecution is by or on behalf of a corporation or other body of persons, a person who is a member of such a body is not by reason of his membership merely disqualified to act as a judge. But if on the

other hand he has taken an active part in suggesting or directing the prosecution or is the executive officer charged by the body with the conduct of such prosecutions, he is incompetent. Thus in *Leeson* v. *The General Council of Medical Education*, 43 Ch. D, 366, the proceedings against the plaintiff were instituted by the managing body of a company called the Medical Defence Union whose object was to protect the characters of medical practitioners and to suppress and prosecute unauthorised practitioners. Two out of twenty-nine persons in the general council of Medical Education and Registration who held the inquiry being members of the Medical Defence Union but not of the Managing body of the union, it was held that they were not disqualified. The distinction we have pointed out has been adopted by the Indian legislature in the sections we have already quoted, as also by the English legislature in S. 258 of the Public Health Act of 1875. It has been decided under these sections that they are merely intended to remove the disability which might be supposed to attach even to bare membership and not to remove the disqualification which results from taking an active part in the prosecution. The Chairman of a municipal corporation being its principal executive officer and therefore primarily responsible for the prosecution of offences against the municipalities is accordingly considered incompetent to try such offences. (*Queen Empress* v. *Erugadu*, I. L. R, 15 M, 83, *Kharak Chand Pal* v. *Taruck Chandra Gupta*, I. L. R, 10 C, 1030, *The Queen* v. *Meyer*, 1 Q. B. D, 173; The *Queen* v. *Lee*, 9 Q. B. D, 394). Where an officer of a corporation appointed to collect the borough rate obtained a summons against a rate payer in arrear without consulting the town council, it was held that a sitting magistrate was not disqualified on the ground of his being a town councillor, (*The Queen* v. *Handsley*, 8 Q. B. D, 383).

Another important limitation of the rule that a man cannot be a prosecutor and a judge occurs in cases in which the alleged prosecution consists in a mere formal initiation of proceedings, (*Government of Bengal* v. *Heera Lal Das*, 17 W. R., C, 39) or in which a relation between two parties is created by statute and the duty is imposed upon one of them by law of investigating and deciding upon the conduct of the other (*Wildes* v. *Russell*, L. R, 1 C. P, 722). The reason for the exception in the cases is either that the keenness of interest which arises from the pursuit and collection of evidence

against a person and produces a mental bias against him is wanting or that on a consideration of all the advantages and drawbacks of the situation, the legislature has thought that the very person who has to superintend the conduct of persons brought into official relation with him would be the most satisfactory judge of it. In the *Government of Bengal* v. *Heera Lal Das* the proceedings of a magistrate who tried prisoners charged with having committed offences under Ss. 93 and 95 of the Registration Act XX of 1868 were held not to be illegal, merely because the prosecution was instituted against the accused by the same magistrate in his official capacity of sub-registrar. In *Wildes* v. *Russell*, a clerk of the peace was tried and dismissed by justices for misdemeaning himself in office by refusing to enter on record an order for the payment of costs payable by some of the justices to their solicitor in their official capacity. It was pointed out by *Mr. Justice Montague Smith* that the maxim "nemo sibi esse judex vel suis jus dicere debet" could not have any reference to a state of things where the relation is created by statute and the judges have a duty imposed upon them to investigate and decide. "Suppose" he said "the clerk of peace were wilfully to falsify a record of court, is it to be said that they have not power to bring before themselves and investigate such a charge ? It would be plainly their duty to do so. And the same principle must apply to any other offence." In regard to certain kinds of offences affecting the administration of justice, the Criminal Procedure Code provides that the courts before or against which they are committed may themselves try such offences (see Chapter XXXV).

Besides the relations we have discussed there are other relations in life which may be supposed to disqualify a judge. Thus the fact that a judge was counsel in the cause before being raised to the Bench would not preclude him from taking part in the hearing and discussion of that cause, but he may properly decline to take part in such hearing and discussion unless his doing so would entail great inconvenience and expense on the parties or perhaps, from his being as in Chancery the sole judge of the court, amount to a denial of justice (*Thellusson* v. *Rendleshaw*, 7 H. L. C, 429). A very difficult question on the subject of disqualifying interest is the competency of a judge who is cited as a witness by either party. Strictly speaking the disqualification if any in such a case is not based on interest. A witness has as such no special

interest in favour of one party or the other. The incompetency alleged to exist is due to the inconvenience of the situation which obliges a man to be a judge of the admissibility and credibility of his own evidence. The principal ways in which a party may be prejudiced by a judge being also a witness are by the improper admission of evidence which ought not to be admitted and by the undue appreciation of his evidence These are matters which do not affect the competency of the judge. The dangers of allowing a man to try a case in which he has given evidence as a witness are forcibly pointed out in the judgment of *Mr. Justice Markby* in *Empress* v. *Donnelly,* I. L. R, 2 C, 405 in which after examining the authorities he comes to the conclusion that a judge who is a sole judge of law and fact cannot try a case in which he has himself given evidence. The other judge *Mr. Justice Prinsep* solved the difficulty by holding that a judge cannot under such circumstances be a witness. This view has the support of Mr. Taylor (on Evidence, S. 1379) but cannot in our opinion be reconciled with the provisions of the Evidence Act. The grounds of incompetency of witnesses are all mentioned in the Evidence Act and the circumstance of the witness being also the judge is not one of them. Besides where a judge has knowledge of the circumstances relating to the case, it is unfair to the parties that they should not be at liberty to examine the judge as a witness and utilize his evidence. (*The Queen* v. *Mookta Sing,* 13 W. R. 60; 4 B. L. R, 15). In the case of *Hurro Chunder Pal,* 20 W. R, 76, it was observed by *Mr. Justice Phear,* " It has been held by this court and is accordant with the general principles which govern the conduct of an English court of criminal justice, that while a person is not necessarily disqualified from presiding as a judge or acting as a juryman upon an inquiry into or investigation of facts, because he may have been himself a witness of some of the facts which are the subject of the inquiry or investigation, if he does do so, he is bound to state to the prisoner or other person concerned or to make known to him so far as he can, what are the facts which he himself observed to which he himself can bear testimony. And moreover the prisoner who is being tried by a judge in this situation has a right, if he thinks it desirable, to cross-examine the judge who under these circumstances and to this extent must be viewed as a witness and his evidence should be recorded. It is quite

erroneous to suppose that the judge is bound to keep out of sight altogether the part which he has played in the matter and to pretend that he knows nothing about the facts excepting so much as the witnesses tell him in court. It is always dangerous for any man in whose right conduct others are concerned to set up and endeavour to carry out a fiction such as this." Where the evidence of the judge can be submitted to other judges sitting with him or to jurymen, there is no great inconvenience in allowing a judge to try a case in which he is a witness. It is only when he is the sole judge of law and fact that there is difficulty in determining which of the two evils is worse, *viz.*, disqualifying the judge or permitting him to try the case in which he is a witness. In the recent case of *The Queen* v. *Farrant*, 20 Q. B. D, 58 it was decided that the fact that a magistrate has been subpœnaed and that it is intended to call him as a witness at the hearing was not a legal disqualification. *Mr. Justice Stephen* pointed out that great mischief and inconvenience would be caused by holding the contrary view, since it would be in the power of either party by serving a subpœna to prevent any particular judge or magistrate from sitting. We are inclined to think that the balance of convenience is in favour of the view taken in this case. When the judge is really acquainted with the facts of the case and there is a *bona fide* desire to examine him as a witness, the larger powers of transfer vested in the High Courts would, we think, be a sufficient safeguard against the anomaly and the inconvenience of a witness being a judge.

The fact that a judge has already formed a strong opinion on the case, is no legal ground of disqualification. Thus in *The Queen* v. *Tarinee Churn Bose*, 21 W. R, Cr., 31 the High Court declined to interfere with the order of a Municipal Commissioner who was the editor of a newspaper, who had prior to the disposal of the case made very strong remarks upon the case in his newspaper.

When a judge is disqualified on the ground of pecuniary or personal interest, his deputy will be regarded by the law as equally incompetent, (*The Queen* v. *The Manchester, Sheffield and Lincolnshire Railway Company*, 336, 339). But a distinction must be drawn between the case of a deputy who is dependent upon his superior and a mere subordinate who is not dependent on his superior. The disqualification of the principal affects the former

but not the latter. In *Dimes* v. *Grand Junction Canal,* 3 H. L. C, 759 the contention that the interest of the Lord Chancellor disqualified the Vice-Chancellor also was over-ruled by the House of Lords.

Where a judge disqualified by interest takes part in the hearing and discussion of a case with other judges sitting with him, the court is improperly constituted and the decision is voidable, notwithstanding that there may be a majority of judges in favour of the decision without reckoning the vote of the interested judge, see *The Queen* v. *The Inhabitants of Upton St. Leonards,* 10 Q. B, 827, *Queen* v. *Justices of Suffolk,* 18 Q. B, 416, *The Queen* v. *Milsedge,* 4 Q. B. D, 332; *The Queen v. Lee,* 9 Q. B. D, 394. It is no answer to the objection that the interested judge withdrew before the decision, if he appear to have joined in discussing the matter with the other judges. The rule is founded on two very good reasons, one being that it is impossible for the court to determine the extent to which the minds of the other judges may have been consciously or unconsciously influenced by the interested judge, *The Queen* v. *Justices of Hertfordshire,* L. R, 6 Q. B, 753 and the other reason being that the administration of justice should be above all suspicion and secure the confidence of the people (*Sergeant* v. *Dale,* 2 Q. B. D, 558). In *The Queen* v. *Meyer,* 1 Q. B. D, 173, the chairman of a local board sat as a justice with other justices in the trial of a case in which the summons had been taken out by the board. The chairman stated that though he sat with the other three justices, he took no active part until the other justices had unanimously determined to convict, when he proposed mitigation of penalties and that he did not sign the convictions. It was held that the chairman had such an interest as might give him a real bias in the matter, that he ought not to have sat as a justice and that it was immaterial what part he took part in the matter. When however it is expressly shown that the interested judge took no part in the hearing, came into court for a different purpose and did not in any way influence the decision, his mere presence on the bench during part of the hearing of an appeal is not sufficient ground for setting aside an order made by the bench at such hearing.

The rules we have stated with regard to the disqualification of judges are also applicable to the case of arbitrators. But if

parties choose to submit their disputes to the decision of an arbitrator with full knowledge of the likelihood of his being biassed, they cannot afterwards object to his decision on the score of his want of neutrality, see *Ranger* v. *Great Western Railway Co.*, 5 H. L. C, 72, 88. With regard to jurymen it has been held that the mere fact of a juryman who is open to challenge having served on the jury is not *per se* a ground for disturbing the verdict (*Williams* v. *Great Western Railway Co.*, H. & N., 869).

The disqualification which arises from interest is one which does not render the decision of the judge void but only voidable. It is a defect to which objection may be waived by a party and if he has taken the chance of a decision in his favour, he cannot afterwards raise it (*Wakefield Local Board of Health* v. *West Riding and Grimsby Railway Co.*, L. R, 1 Q. B, 84). When a party omits to take the objection at the hearing, he cannot get the order reversed if it does not appear on the face of his affidavits that neither he nor his counsel was aware of the objection at the time of hearing. Though interest ordinarily renders a judgment voidable, it does not produce this effect in a case of necessity. In a case in the Year Books it was held that it was no objection to the jurisdiction of the Common Pleas that an action was brought against all the judges of the Common Pleas in a case in doubt which could only be brought in that court (*Per Parke, B*, in *Dimes* v. *Grand Junction Canal*, 3 H. L. C, 788).

SPECIAL CONSTABLES AND THE MASULIPATAM RIOTS.

The Masulipatam riots have forced into prominence a question of constitutional value. In consequence of the riots and of an apprehended repetition of the disturbance the Superintendent of Police applied to the Magistrate of the District for the appointment of special police officers and the Magistrate appointed a number of pleaders and merchants as constables in accordance with the direction contained in S. 16 of Act. XXIV of 1859. This order the constables were bound to obey at the risk of liability to the penalty for refusal or neglect imposed by S. 18 of the Act. Considerable heart-burning at the high-handedness of the

authorities naturally arose but the persons aggrieved had no means of obtaining legal redress in a court of law. When a question was asked in the local Legislative Council as to the circumstances which led to the appointment as police constables of men engaged in the pursuit of lucrative professional business, the District Magistrate and the Government expressed considerable surprise and regret at what they characterized as the absence of a loyal disposition to help in the preservation of order. We have no doubt that the action of the Magistrate was strictly legal. But was it in accordance with the spirit as with the letter of the law? Section 16 says, "When the ordinary officers appointed for preserving the peace are not *sufficient* for its preservation and for the protection of the inhabitants and the security of property, it is lawful for a police officer not below the rank of inspector to apply to the nearest Magistrate to appoint *so many of the public or village servants or residents of the neighbourhood* as such police officer may require to act as special police officers and it shall be the duty of such Magistrate at once to comply with such application." The insufficiency of the ordinary police is the condition precedent for the appointment of special police officers. If they are numerically sufficient to cope with the emergency anticipated, the Superintendent merely because he considers that certain influential citizens being enlisted as constables will have sufficient moral force upon the community to prevent any disturbance or he conceives that they are ringleaders of questionable movements, whose compulsory enlistment will deprive the factions of the organizing power that can goad them into effective tumult, has not the power under the section to apply for their appointment as special police officers nor the Magistrate the power to appoint them. The only consideration legally admissible in determining whether there shall be an appointment of special officers is the sufficiency or insufficiency of the ordinary police. The contention of those that protested against the appointment was that the ordinary police were sufficient for the purpose of preserving order. It is of course open to the Superintendent and the Magistrate to differ from that opinion. But the mind has to be honestly made up on the question of the sufficiency and considerations foreign to the question ought not to be allowed to decide it. It was generally believed in Masulipatam that what dictated the appointment was not the insufficiency of the police but a desire to

reduce the factions to submission by heaping indignity on some of the leading citizens or mere desire to humble the pleaders who were supposed rightly or wrongly to have helped or encouraged the men who instituted the civil action for damages against the Superintendent which has since terminated in the decision of the High Court in *Ranganayakulu* v. *Prendergast*, I. L. R, 17 M, 37. But the Government did not in their answer to the question in Council vouchsafe a reply as to whether with the reserve police, order could not have been maintained and whether the appointment of special constables was necessary. In the absence of a candid disclosure of the circumstances which led to the appointment Government cannot lull the suspicion that considerations, other than the insufficiency of the police, which are foreign to the section had a share in determining the order of the Magistrate. A provision similar to that which is contained in S. 16 of Act. XXIV of 1859 is enacted in S. 17 of the Madras Town Police Act III of 1888 which says that " the Commissioner may of his own authority appoint any able-bodied male person between the ages of eighteen and fifty-five to be a special constable to assist the police force on any emergency." And a penalty for refusal to act is enacted in S. 19 of that Act. Here the insufficiency is not laid down in terms as a condition of the appointment though we think it may be implied from the use of the words, " *Assist the police* on any emergency." Section 16 of Act XXIV of 1859 appears clearly to have been borrowed from the English Act 1 and 2 Will IV, Chap. 41. The language of the 1st section of the statute is very similar to that of the Indian Act. It says "wherever it shall be made to appear to two Justices of the Peace that any tumult, riot, or felony has taken place or may be reasonably apprehended in any place and such Justices shall be of opinion that the ordinary officers appointed for preserving the peace are *not sufficient* for the preservation of the peace and for the protection of the inhabitants and the security of the property, &c., then the Justices are hereby authorized to nominate and appoint so many, as they shall think fit of the house-holders or other persons (*not lawfully exempt* from serving the office of constable), residing in such place, to act as special constables, &c." There is a proviso to this section which is an improvement upon the provisions of S. 16 of the Indian Act and the section also suggests that there are persons lawfully exempt

from serving as constables. The proviso is a check upon the high handedness of the local authorities which ought to be introduced with the necessary variation in the language into this country, for it enacts, "that whenever it shall be deemed proper to nominate and appoint as aforesaid, notice of such nomination and appointment and of the circumstances which have rendered such nomination and appointment expedient shall be forthwith transmitted to one of Her Majesty's Principal Secretaries of State." Whatever justification there was for the omission of this clause in the Indian Act thirty-five years ago in this country of vast distances without the railway and the telegraph, there is no excuse for not introducing it now. We can have no doubt that if the Government had been apprised of the appointments as soon as they were made no false notions of prestige would have operated upon the Government to induce them to uphold the action of the local authorities in disregard of popular opinion. The jealousy of interpellation as a means of redressing grievances, would not determine the attitude of Government towards the action of the local officers. The English statute empowers the appointment of persons other than those lawfully exempt. The Magistrate shall cause to be indicted the special constable refusing to act, see *Reg* v. *Vincent*, 9 Car. & P, 91 and S. 8 of 1 & 2 Will. IV, Ch, 41. Section 6 of 5 and 6 Vic, Ch. 109 gives a long list of persons exempted from service. "All peers, all members of the Commons House of Parliament, all judges of courts of record, all justices of the people, *all clergymen, &c.*, all schoolmasters, all sergeants and *barristers-at-law actually practising*, doctors of law and advocates actually practising, *all attorneys, solicitors, proctors actually practising*, all conveyancers and special pleaders, all coroners, jaolers and keepers of houses of correction, all surgeons and apothecaries actually practising shall be freed and exempt from serving the office of constable under this Act." The absence of a similar provision in the Indian Act is much to be regretted. If it had found a place in the Indian statute book there would have been no legal justification for the appointment of pleaders and trustees of temples as constables, made by the Magistrate of Kistna. But the absence of that provision does not absolve the authorities from the responsibility of bearing the policy of the English law in mind, in selecting the men for appointment. The Indian Act does not prevent the appointment of all judicial

officers including the Sessions Judge, as special constables, if the officer empowered to appoint has some animus to gratify by such an exercise of his discretion. But there can be no doubt the Government will then feel bound to express their regret at the indiscretion of the Magistrate. We think that the surprise and the regret of Government should have been directed to the conduct of their local officers who proved themselves unworthy of the discretionary authority vested in them rather than to the conduct of the leading citizens who resented the appointment as a slur upon themselves. As pleaders and as trustees of religious institutions they perform public functions from the performance of which they cannot properly be taken away, when the duties of a constable can be more efficiently discharged by other men more used to the sort of rough work which they involve. If the danger threatened is of such a magnitude that it cannot be safely left to be dealt with by other special constables, and the aid of persons exempt by law is also necessary for the preservation of order, the English Statute 1 and 2 Will IV, Chap. 41, Section 2, specially authorizes the Secretary of State, not the Justices, to appoint even such persons on the representation of the Justices. The Highest Officer of the State is selected to be the custodian of high powers. The authorities of the Kistna District and the Government of Madras have so signally failed to realize the character and scope of the powers conferred by S. 16 of Act XXIV of 1859, that we think some honourable member should move at an early date for leave to amend the Indian Act in order that provisions similar to those that are found in the English Act as to the exemption of certain classes of persons from compulsory service and as to local officers, immediately after appointment of special constables, reporting to Government the circumstances leading to the appointment. We think the amendments are more necessary here than in England, because public opinion is not strong enough to check the vagaries of local officers and because, while the power of appointment in England is exercisable by Justices of the Peace upon the oath of witnesses, it can be excercised here by a magistrate upon the application of an Inspector of Police.

SUCCESSION CERTIFICATE IN A SUIT FOR SALE UPON A MORTGAGE.

The application of S. 4 of the Succession Certificate Act (No. VII of 1889) to suits for sale under S. 88 of the Transfer of Property Act (No. IV of 1882) recently formed the subject of consideration by a Full Bench of the Allahabad High Court in the case of *Fatteh Chand* v. *Muhammad Baksh,* I. L. R, 16 A, 259. It has been unanimously ruled that that section applies to suits for sale in the same way as it would apply to an ordinary suit for recovery of a debt. The judgment in the case was delivered by the Chief Justice with the concurrence of the other five Judges. The contention in the case was that S. 4 of Act VII of 1889 did not apply to a suit on a mortgage by the mortgagee against the mortgagor for sale of the mortgaged property, inasmuch as under that section a court could not pass a decree, without the production of a succession certificate, against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person—and a suit for sale was not a suit for a debt. The Chief Justice in the judgment of the Full Bench observed as follows :—

" Money lent on the security of a mortgago is a debt due from " the mortgagor to the mortgagee, although from the terms of the " contract, it may not be recoverable from the mortgagor personally " or except by a decree for sale of the mortgaged property. A " mortgagee who brings his suit for sale is bringing his suit against " his debtor, the mortgagor, for payment of his debt, and the " decree which he seeks in that suit is a decree for payment of his " debt, by sale of the mortgaged property. A decree for sale under " S. 88 of the Transfer of Property Act (No. IV of 1882) orders that " an account be taken of what will be due to the plaintiff for prin- " cipal and interest on the mortgage, and declares the amount " so due at the date of the decree. The decree for sale also orders " that in default of the defendant paying the amount found or " declared to be due, the mortgaged property or a sufficient part " thereof be sold, and that the proceeds of the sale (after defraying " the expenses of the sale) be paid into court and applied in pay- " ment of what is so found due to the plaintiff. S. 88 of Act IV of " 1882 appears to us to show that a suit for sale is a suit in which, " if the plaintiff succeeds, the decree which the court passes is one

"form of a decree for payment of a debt. It may be that the "proceeds of the sale may not be sufficient to discharge such debt, "and in that case the mortgagee has recourse to S. 90 of the same "Act when that section applies. In our opinion S. 4 of Act VII "of 1889 applies to suits for sale under S. 88 of the Transfer of "Property Act 1382. A mortgagor needs as much protection as "any other debtor when sued for a debt by a person claiming to "be entitled to the effects of his deceased creditor." There is some conflict upon the point between the different High Courts. In *Kanchan Modi* v. *Baij Nath Singh,* I. L. R, 19 C, 336, *Justices Ghose* and *Rampini* held that the assignee of a property mortgaged is not a debtor within the meaning of S. 4 of Act VII of 1889, and a mortgagee praying for the sale of the property and asking for no relief personally against the mortgagor is not bound to take out a certificate under that Act before he can obtain a decree. Their Lordships' reason for this conclusion seems to be that in a suit for sale the mortgagee does not seek recovery of a debt—but seeks recovery of an interest in immoveable property, as was observed by *Sir Barnes Peacock* in *Surwan Hossein* v. *Shahazada Golam Mahomed,* 9 W. R, 170. In *Roghu Nath Shaha* v. *Poresh Nath Pundari,* I. L. R, 15 C, 54, it was ruled by *Justices Wilson* and *O'Kineally,* under Act XXVII of 1860 that the word "debtor" in S. 2 of that Act does not include the purchaser of a mortgaged property who is in no sense a debtor, nor does that section contemplate a case of a decree other than a personal decree. The judgment in the last case was delivered by *Wilson, J.* His Lordship in that case considered the ruling in the case of *Janaki Ballav Sen* v. *Hafiz Mahomed Ali Khan,* I. L. R, 13 C, 47, and observed that he was not prepared to follow the proposition laid down there that a suit will not lie without a certificate by the representative of a deceased person to enforce a mortgage against the mortgaged property. In the Madras High Court *Justices Muthusami Aiyar* and *Best* had to consider the same point with reference to a suit for foreclosure in *Ammanna* v. *Gurumurthi,* I. L. R, 16 M, 64. It was ruled there that the plaintiffs had a vested right to a decision in the suit already instituted by them in accordance with the law as it existed when the suit was instituted, and that right would certainly be curtailed if the Act subsequently passed were applied to it and secondly that the suit being one for

foreclosure of the mortgage, and not one for the payment of a debt, the Act would not apply, the direction in the decree to pay in 6 months being given not to fix a personal liability for the debt, but to enable the defendants to save their right of redemption, and to prevent its extinction by foreclosure. It is doubtful how far their Lordships of the Madras Court were right in holding that any vested right given was curtailed by Act VII of 1889. As was observed by the Full Bench of the Allahabad Court in *Fatteh Chand* v. *Mahommed Baksh*, no right of action vested or otherwise was intended to be, or was, taken away, or in any respect modified, altered, or interfered with, by the repeal of S. 2 of Act XXVII of 1860, the rule in question being only a rule of procedure. However with reference to the point under consideration it is necessary to ascertain what the Legislature intended by enacting Act XXVII of 1860 or Act VII of 1889. In the preamble to Act XXVII of 1860 the object set forth is to provide greater security for persons paying to the representatives of deceased persons debts which are payable in respect of the estate of such deceased persons. The same object is kept in view in the Succession Certificate Act (No. VII of 1889), the words in the preamble being "to afford protection to parties paying debts to the representatives of deceased persons." The object of the enactment being thus clear the mortgagor is as much entitled to protection as any other debtor. A mortgagor who owes money to his mortgagee is certainly his debtor though the mortgagee has to realize his mortgage-debt (if it is not paid by the mortgagor) by sale of the mortgaged property. The case of *Surwan Hossein* v. *Shahazada Golam Mahomed* 9 W. R, 170, decided a question of limitation under Act XIV of 1859, as to whether a suit under a simple mortgage to have it declared that lands are charged with the payment of the debt, and for an order for sale of the lands in satisfaction of the debt falls within Cl, 12, S. 1 of Act XIV of 1859 and should be brought within 12 years from the date of the cause of action. It hardly applies to the case under consideration. Under Act XIV of 1859 a suit for money charged upon immovable property by way of a simple mortgage was governed by the six years or three years rule according as the covenant to pay was duly registered or not, provided the plaintiff claimed to recover the money merely as a debt, and did not seek to enforce his lien, But a suit in which the

relief sought was the recovery of the mortgage money by enforcement of the lien and sale of the mortgaged property, was dealt with under Cl. 12, S. 1 as a suit for realization of an interest in land and governed by the 12 years' rule. A suit of the latter class under the present Limitation Act (XV of 1877) would fall under Art. 132 or as the Allahabad High Court has held under Art. 147 of Schedule II of that Act. But in any view of the case—and even according to the judgment of *Sir Barnes Peacock* relied upon by the Calcutta Court in I. L. R, 19 C, 336, it is clear that the claim relates to a debt, the limitation applicable to which depends upon the manner and form in which its recovery is sought. The suit may be a suit to recover money by a personal decree, or to enforce payment of money charged upon immoveable property, or a suit by a mortgagee for foreclosure or sale, it is none the less a suit in which it is sought to recover the money lent, and in which a decree is passed for payment of a debt due, and the eventual remedies of sale or foreclosure are the result of non-payment of the debt due on the date fixed by the court. *Sir John Edge* in his judgment in the Full Bench case under notice is not quite consistent when he tries to distinguish the ruling of the Madras Court in I. L. R, 16 M, 64 by observing that the suit in that case "was one for "foreclosure of a mortgage, and we think that there can be no "doubt that a suit for foreclosure of a mortgage could not in any "sense be considered as a suit for a decree for payment of a debt." In a decree for foreclosure, as in a decree for sale, if the plaintiff succeeds, the court shall make a decree ordering that an account be taken of what shall be due to the plaintiff for principal and interest on the mortgage on a particular date or declaring the amount so due at the date of such decree, and ordering payment of the amount so due on a fixed date. And it is only when the money so found due and awarded is not paid as directed by the court that a certain legal consequence is to follow, that the defendant is absolutely debarred of all right to redeem the property. Now a considerable portion of the arguments of *Sir John Edge* in the Full Bench case, relating to a suit for sale applies with equal force to a suit for foreclosure. A transaction of mortgage culminating in a suit for sale or foreclosure according as the mortgage is a simple mortgage, or a mortgage by conditional sale is in its inception a debt from the mortgagee to the mortgagor,

with certain securities and remedies attaching thereto. A decree passed in such a case is in the first instance a decree for payment of an ascertained amount found due to the mortgagee by the mortgagor. And it is necessary that if a person paying money to the representative of a deceased person needs protection such protection should be extended to all cases in which a decree has to be passed for payment of money due, no matter what the consequences may be if the money is not paid as directed by the decree.

DURGA CHARAN BANERJI.

NOTES OF INDIAN CASES.

Srinivasa Ayyangar *v.* **Queen-Empress,** I. L. R, 17 M, 105. Section 15 of the Letters Patent constituting the High Court provides an appeal against every judgment of a single judge of the court, not being 'a sentence or order in a criminal trial.' Is there an appeal against an order of a single judge under S. 195, Criminal Procedure Code, granting or refusing sanction to prosecute an opponent for an offence under S. 192 of the Penal Code? The answer must be in the affirmative unless the order could be said to be 'a sentence or order in a criminal trial.' It is needless to say that it is not a 'sentence.' Is it an order in a criminal trial? Wharton defines 'Trial' as the examination of a witness, civil or criminal, before a judge who has jurisdiction over it, according to the laws of the land. According to Stroude 'trial' is the conclusion by a competent tribunal of questions in issue in legal proceedings whether civil or criminal and the author quotes authorities which hold that an assessment of damages by a jury on a judgment by default in an action of tort, and the hearing of the reference of an action and all matters of difference do not come within the signification of 'trial.' If this be so, we think there are far stronger reasons for holding that a proceeding under S. 195 is not a trial, much less a criminal trial. It is a proceeding to determine whether there should be a criminal trial, and where it is held in a court we think the proceeding is not a criminal proceeding at all. In the Criminal Procedure Code the word is generally used to mean only the actual hearing of a criminal case to determine the guilt or innocence of the accused. *Collins, C. J,* and *Shephard, J.* hold that there is no appeal against an order under S. 195 of a single judge of the High Court. The judgment is short and states no reasons. We think that the fact that the proceeding is held under a section of the Criminal Procedure Code

does not make it a criminal proceeding. The Bombay High Court entertained an appeal in a proceeding under S. 491, Criminal Procedure Code, in *In the matter of Narrondas Dhanji*, I. L. R, 14 B, 555, and in a proceeding on contempt in *Navivahoo* v. *Narotamdas Candas*, I. L. R, 7 B, 5. The latter case is noticed and dissented from by the Madras High Court.

Queen-Empress *v* **Marian Chetti**, I. L. R, 17 M, 128. We are glad to note that our view regarding the illegality of the delegation of legislative power has received the approval of the Madras High Court. See 3 M. L. J, p. 215; also 3 M. L. J, p. 115. *Collins, C.J.* and *Shephard, J.* hold that the power conferred by the Indian Ports Act on the Local Government to make rules under the act could not be legally delegated to a conservator of a port.

Suresh Chunder Maitra *v*. **Kristo Rangini Dasi**, I. L. R, 21 C, 249. In a similar case the Madras High Court held that a second appeal lay. They construed S. 586, Civil Procedure Code, to mean that a second appeal is denied only when the suit is rightly instituted in the first court. But where the suit being one cognizable by a Small Cause Court was wrongly instituted in the regular court, S. 586 according to them did not prevent a second appeal notwithstanding the fact that the value was less than Rs. 500. Their lordships overlooked the distinction between cases where the first court being without jurisdiction an appeal lies notwithstanding, and the present where the objection to the second appeal does not rest upon the ground that the regular courts have no jurisdiction, a disability common to the three courts, but upon the special ground that S. 586 bars a second appeal as the value is below Rs. 500. The Calcutta Court is therefore right in holding that no second appeal lay. But we are unable to follow the observations of the Calcutta Court upon S. 646, B. It seems to us that there is nothing in that section to control the language of S. 16 of the Small Cause Act. The legislature thought that the District Judge should not decide a question of jurisdiction dependent upon the case being cognizable by a Small Cause Court or not in view to the fact that a further appeal is prevented by S. 586 if the suit ought really to have been instituted in the Small Cause Court. He is therefore required to refer the question to the High Court whose decision upon the reference would be conclusive and save considerable expense to the parties.

Jiban Das Oswal *v*. **Durga Pershad Adhikari**, I. L. R, 21 C, 252. This decision as to the rule of *res judicata* in respect of past and future mesne profits claimed as to which a former decree was silent, lays

down rules which are entirely in accord with what we stated in a critical note upon the case of *Ramabhadra Razu* v. *Jagannatha Razu*, I. L. R, 14 M, 328, in 1 M. L. J, p 213. As to the mesne profits claimed prior to the former suit, the decree has the force of *res judicata* though silent. As to future mesne profits claimed the silence of the prior decree cannot be taken as amounting to refusal and therefore a fresh suit is not barred.

Griffiths *v.* **Tezia Dosadh,** I. L. R, 21 C, 262. Notwithstanding the English decisions which turn upon S. 3 of 4 Geo. IV, Ch. 34, we think *Prinsep* and *Ameer Ali, J.J*, are right in their interpretation of the Indian Act. In the absence of language of the kind found in the English Statute the leaning of the court should be against a second offence being committed by a continuance of the same breach of contract.

Sital Hari Banerjee *v.* **Heera Lal Chatterjee,** I. L. R, 21 C, 269. The decision in this case has our entire approval. But we are not sure that the reasoning is altogether correct. S. 157 is the only provision as to the procedure of the court where the parties or any of them fail to appear at the adjourned hearing, at whatever stage the case might have been adjourned. Suppose the adjournment was made after some of the plaintiff's witnesses had been examined and on the adjourned date both parties fail to appear or the plaintiff or the defendant alone fails to appear. The court has power to proceed under Ch. VII or to make any other order it thinks fit. If it proceed under Ch. VII, it is bound to dismiss the case for default under S. 98 or S. 102 or hear the case *ex parte* as the case may be. Where there is a dismissal for default, Ss. 99 and 130 must undoubtedly apply. But in the other case of a proceeding *ex parte*, S. 108 cannot apply because there is *no decree ex parte* if the defendant appeared and pleaded at one stage. Although the proceeding from the adjourned date was *ex parte*, the decree is not *ex parte* and S. 108 does not therefore apply. The decision of the Privy Council in *Zainulabdin Khan v. Ahmed Raza Khan*, L. R, 5 I. A, 283 explains the law on the point although it was passed upon the language of Act VIII of 1859. The decisions in *In the matter of Doyal Mistree* v. *Kupoor Chund*, I. L. R, 4 C, 318 and *Ramtahal Ram* v. *Rameshar Ram*, I. L. R, 8 A, 140 do not affect the question for in those case there was no real appearance at any stage.

Bikramjit Tewari *v.* **Durga Dyal Tewari,** I. L. R, 21 C, 274. We are glad to have th support of *Trevelyan* and *Bannerjee, J. J.* in the view we maintained in 1 M. L. J, 582, that interest *post diem* in mortgages is recoverable from the mortgaged property. The learned judges rest their conclusion mainly upon the provision of the Interest Act, S. 2 of 1839 corresponding to the 28th section of the English Statute, 3 & 4

Will. IV, Ch. 42. And they say that interest is awardable *post diem*, and such interest falls within the term "interest" in S. 86 of the Transfer of Property Act. The Allahabad cases are not of much authority as the Interest Act is not noticed in them. We doubt very much whether if attention had been drawn to that Act the Allahabad judges would have modified their opinion. The Calcutta Court however leaves the question of limitation as to such *post diem* interest where it was upon the decision in *Gudri Koer* v. *Bhubaneswari Coomar Singh*, I. L. R, 19 C, 19. The Calcutta judges in I. L. R, 19 C, 19 and the Allahabad Court have refused to allow the twelve years' period under Art. 132, because such *post diem* interest is not charged upon the property at the date of suit. But we think the language of the Article is not incapable of the extended signification, that a suit for the recovery of money which the court is bound to award as a charge upon the property is a suit for the recovery of money charged upon immovable property.

We join in the protest of the learned judges against the shabby system of Indian reporting where the arguments on both sides are not given in the report. The Allahabad and Madras reporters are the worst sinners in this respect. Either the Government should appoint men to the office of reporters who have the leisure and are willing to take the trouble to note the arguments in court or they should appoint competent assistants who will do the work. We hope the Government and the reporters will bear in mind the words of *Trevelyan* and *Bannerjee, J.J.* Their lordships say, "We are sorry to say, very frequently in reports of cases tried in Indian courts, there is no reference at all to the arguments of pleaders or other legal representatives of the parties and no statement of the statutes or cases cited. We have frequently had to point out that in the absence of a detail of the arguments and of the Acts cited in respect of a decision, that decision is of very much less value than it would otherwise be."

Gangacharan Singh *v.* Queen Empress, I. L. R, 21 C, 337. The police charge a person with having committed an offence though it was a case of mistaken identity. They apprehend him but he escapes from custody. We are inclined to think that the escape is an offence under S. 224 of the Penal Code. *Prinsep* and *Hill, J.J.* seem to think that because some other person of the same name was the man who had been charged and against whom a warrant had issued, therefore the person apprehended was not charged with an offence. But we think he was charged as well when the police suspecting him to be the man arrested him. The decision must be considered doubtful unless the

broad proposition can be maintained, that unless the person in custody turns out to be the actual offender, he is at liberty to make his escape with impunity.

Queen Empress v. Bisheshar, I. L. R, 16 A, 124. There has been a considerable conflict of opinion as to the meaning of the second part of Section 211, I. P. C, *Empress of India* v. *Pitam Rai*, I. L. R, 5 A, 215, *Empress* v. *Parahu*, I. L. R, 5 A, 598 and *Queen Empress* v. *Karim Buksh*, I. L. R, 14 C, 633 on the one side, and *Queen* v. *Bonomally Sohai*, 5 W. R, Cr., 32; *Raffee Mahomed* v. *Abbas Khan*, 8 W. R, Cr., 67 and *Karim Buksh* v. *Queen Empress*, I. L. R, 17 C, 574 on the other. We are disposed to agree with the Allahabad Court in their view that the institution of criminal proceedings is in a court and if the proceedings are upon a false charge of an offence of the description referred to, the person instituting the proceedings is punishable under the second part of the section. We think that the words " instituting criminal proceedings " and "making a false charge" should be regarded as mutually inclusive. There may be some inconvenience in this view, for as the charge of heinous offences will generally be begun before the police, the person making the false charge may escape the higher punishment provided in the second part. But this is a matter for the consideration of the legislature.

Manla v. Gulzar Singh, I. L. R, 16 A, 130. Section 578 of the Code of Civil Procedure is often forgotten by the courts in their desire to uphold the rules of procedure. Misjoinder of causes of action is no reason why such misjoinder should entail the penalty of dismissal of the action when the objection is for the first time taken in appeal. Even though the objection was raised but erroneously overruled in the first court it does not follow that the appellate court is bound to dismiss the suit.

Yeshwadabai and Gopikabai v. Ramchandra Tukaram, I. L. R, 18 B, 66. There were two points raised in this case, one being whether when a written contract relating to the subject matter of a suit is inadmissible in evidence for want of registration, a plaintiff who makes out a *primâ facie* case without betraying the existence of the written agreement is entitled to succeed if it afterwards appears that a written agreement is in existence. The learned judges held in accordance with the authorities quoted in Taylor on Evidence, S. 407, that under such circumstances the plaintiff is entitled to succeed and that it is for the defendant to produce the document as part of his evidence if he means to rely upon it. The other point decided was that if a landlord stands by and raises no objection to the erection of permanent

buildings on his land by the tenant, the tenant is entitled either to retain the land or to compensation on eviction according to circumstances.

Lomba Gomaji v. Vishvanath Amrit Tilvankar, I. L. R, 18 B, 86. Whether a person who lends money to pay off a prior mortgage on a piece of property intends to keep such mortgage alive in his favour is a question of intention as laid down in *Gokuldois Gopaldoss* v. *Rambux Seochand*, L. R, 11 I. A, 126. Where there is no intermediate mortgage or other interest in the property to be protected against, or where the lender is not aware of any such intermediate interest, there can clearly be no intention to keep the mortgage alive in his favour. The hardship which would follow from this view is tried to be mitigated by the Bombay High Court by holding that there is an equity in favour of such a lender which a person who claims the property from him will be bound to satisfy. Dr. Rash Behary Ghose regrets the introduction of the question of intention in these cases on the ground that it is likely to lead to undue refinement, (The Law of Mortgage in India, 2nd ed., p. 374). He suggests that in the absence of express intention, either in the instrument or by parol, the court should look to the benefit of the person in whom the two estates become vested, Practically however the result is nearly the same, whether we hold that the law keeps the mortgage alive for the benefit of the person in whom the two estates have been vested or that in the absence of express intention, the prior mortgage is extinguished but an equity arises in favour of such person. Perhaps there may be a difference in consequences where the person who pays off a prior incumbrance comes foward as plaintiff. If apart from any intention of his own he is regarded as entitled to the benefit of the prior charge, as matter of law, he may actively enforce his claim as plaintiff. But if his payment in the absence of express intention merely creates an equity in his favour, he may not be able to enforce it actively and may only use it as a shield against attack.

Himatram v. Khushal Jethiram Gujar, I. L. R, 18 B, 99. It is probably an oversight on the part of the legislature that the Civil Procedure Code contains no provisions for the investigation of claims to property directed to be sold under a mortgage-decree. Ss. 278 to 283 deal only with claims to property attached in execution of a decree. As property directed by the decree itself to be sold need not be attached, the courts have no power to deal with claims to such property by way of a summary proceedings. The omission is perhaps no matter of regret considering the perfunctory way in which court dispose of claims.

Krishnabai v. Khangonda, I. L. R, 18 B, 197. We agree with the judges in thinking that a partition among the members of a joint Hindu family without reserving any share for a minor member cannot affect his status as a member of an undivided family. As pointed out by the court, apart from Hindu Law, two joint owners cannot, without the consent of the third or of some one authorized to act on his behalf, alter his position as joint owner of the whole property.

Bombay, Baroda and Central India Railway Co. v. Jacob Elias Sassoon, I. L. R, 13 B, 250. Section 470 of the Civil Procedure Code provides for interpleader in cases when the plaintiff himself claims no interest in the property which is claimed by two or more persons adversely to one another. This, as held by *Parson, J.* in the case under notice, does not prohibit an interpleader suit where the plaintiff without asserting any title to the property merely claims a lien on it, say for freight or other charges of that kind, and according to the learned judge, the fact that there is a dispute with regard to the amount of the freight or other charges for which the lien is claimed does not affect the question ; but he holds that an adjudication of such dispute ought not strictly to be had in the interpleader suit but in distinct proceedings between the plaintiff and the person who is declared the owner. The learned judge follows the English cases, there being apparently no Indian case covering the question

In the matter of the Will of Dawubai, I. L. R, 18 B, 227. The provisions of the Indian Statute Book for the relief of paupers from the payment of court fees are certainly meagre. The interpretation by the courts of the provisions on the subject in the Code of Civil Procedure have removed some but not all the hardships arising in consequence. Thus it has been held that a defendant may be allowed to defend a suit *in forma pauperis*, *Doorga Churn Doss* v. *Nittokally Dossee*, I. L. R, 5 C, 819. *Wilson, J.* proceeded in that case on the ground that the Court of Chancery possessed the power of allowing a defendant to defend *in forma pauperis*, that the High Court inherited this power and that the Civil Procedure Code, S. 401 did not abrogate the power which already existed. This reasoning would apparently not apply to the Mofussil Courts. In *Brogeswari* v. *Garoochurn*, I. L. R, 11 C, 735, it was held that a memorandum of objections under S. 561 of the Civil Procedure Code could not be put in *in forma pauperis.* The question whether an application for review could be made *in forma pauperis* was lately raised for decision in the Madras Court, but not decided. If the reasoning of *Starling, J.* in the case under notice be correct the deficiencies of the law will in great measure be supplied. The learned judge uses S. 647 of the Civil

Procedure Code which applies the 'procedure herein prescribed' to all procedings in a civil court other than suits and appeals to enable an executor who is not in possession of any property either of the testator or his own to apply for probate of the will *in forma pauperis*; and his lordship further holds that probate duty also being 'court fees' the pauper is exempted from payment of the same by S. 410 of the Civil Procedure Code. In such cases, the stamp duty due to Government will be a first charge on the property of which the executor is the legal owner under the testator's will.

Krishnaji Ramachandra *v.* **Antaji Pandurang,** I. L. R, 18 B, 256. A life-tenant was in possession of certain premises along with his wife and son. The wife and son continued in possession after the death of the life-tenant for more than 12 years without payment of rent. Was the possession of the life-tenant herein adverse? *Telang* and *Fulton, J. J.* held it was not, because the defendants came into possession of the property by permission of the plaintiff and they never set up a title in opposition to plaintiff. See *Hellier* v. *Sillcox*, 19 L. J, Q. B, 295; Woodfall's Landlord and Tenant, pp. 555, 561. The learned judges say that while the defendant's possession was permissive they were not tenants. This we think is rather confusing. In *Hellier* v. *Sillcox* it was held that in such cases the defendant would be bound to pay compensation to the landlord for his use and occupation of the land. Is not the truth in such a case just this, that the defendant occupies the land and the landlord tacitly agrees to this? If so, is it not enough to create a tenancy? Suppose you go to a shop and pick up an article and take it home, and the shopman acquiesces in your doing so. Is there not a contract for sale of the article for a reasonable price? Similarly was there not in the case in question a contract of tenancy for a reasonable rent? We do not say that use and occupation is always the same as a tenancy but in the present case of what the learned judges call 'permissive possession' we think it was.

Framji Bhicaji *v.* **Mohansing Dhausing,** I. L. R, 18 B, 263 The judgment of *Candy, J.* in this is particularly lucid and instructive and deals with the subject of privilege with regard to professional communications at considerable length. We do not intend to notice the judgment at length on the present occasion. The learned judge points out that the law in India on the matter is substantially the same. The main principle emphasized in the judgment is that the privilege extends only to matters of a confidential nature *i.e.* to such communications as are made for the purpose of obtaining professional advice. Ordinarily

therefore a solicitor would be bound to state the name of his client, unless the name was given to him in confidence and for the purpose of professional consolation. The same observation would apply to the name of any other person who makes any statement to the attorney on his client's behalf, but the purpose of the employment is privileged and not merely the details communicated to the attorney with regard to it.

NOTES OF ENGLISH CASES.

Black v. Christ church Finance Co., 1894, A. C, 48. A company is responsible for the act of its contractor in negligently and improperly lighting a fire on its land, which spread to the plaintiff's lands, though the contractor in doing so acted in violation of special stipulations in such contract with regard to the time at which the fire was to be lit. The company to escape liability must show that the contractor did not act within the scope of his contract, and his act was that of a trespasser. The court observed. "The lighting of a fire on open bush land where it may readily spread to adjoining property and cause serious damage is an operation necessarily attended with great danger, and a proprietor who executes such operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property. And if he authorises another to act for him, he is bound not only to stipulate that such precautions shall be taken, but also to see that they are observed, otherwise he will be responsible for them.

Makin v Attorney-General for New South Wales, 1894, A. C, 57. The prisoners were charged with the murder of a child, which according to the evidence had been received by them from its mother on the representation that they were willing to adopt it. The amount paid was quite inadequate for the support of the child. The body was found buried in the garden of a house occupied by them. Held that evidence was admissible that several other infants had been received by the prisoners from their mothers on similar representations, and on similar terms, and that bodies of infants had been similarly found in the gardens of houses occupied by the prisoners, as such evidence would tend to show that the acts charged against the accused were designed and not accidental it is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced

tends to show the commission of other offences does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

In re **Gasquoine. Gasquoine** *v.* **Gasquoine,** 1894, 1 Ch, 470. A testator appointed his wife and two stock-brokers as his executors and authorized the latter to charge for business done by them as brokers about the estate. The wife and one of the stock-brokers in the usual course of business put certain American Railway bonds for sale into the hands of the other stock-broker James, who had been greatly trusted by the testator. James sold them, who afterwards misapplied a good portion of the money. Held that the other executors were not liable for the loss, as the act by which they enabled James to obtain sole possession of the money was *necessary*, *i.e.*, done in the regular course of business in administering the estate.

Stoddart *v.* **Saville,** 1894, 1 Ch, 480. The ultimate in the marriage of a lady in default of appointment by her was in favour of "the person or persons, who under the statutes for the distribution of intestates' estates would" have been entitled thereto, if she had died possessed thereof intestate *and without having been married.* Held by *Chitty, J.* on the authorities that the italicised clause did not exclude the lady's child by the marriage.

In re **Pratt. Pratt** *v.* **Pratt,** 1894, 1 Ch, 491. A legacy of "£300 invested in $2\frac{1}{2}$ consols" held specific and not demonstrative, partly with reference to the context, the gift being associated throughout the will with a number of other gifts which were clearly specific.

Mayfair Property Company *v.* **Johnston,** 1894, 1 Ch, 508. Where an adjoining owner pulls down and rebuilds the boundary wall and in doing so trespasses into the plaintiff's garden which is in a tenant's possession by placing in the soil foundations and footings of the new wall extending further into the garden, than the foundations of the old wall did, held that the plaintiff could sue for the trespass though the tenant made no complaint, inasmuch as the trespass was of a permanent nature a tenant in common is entitled to partition as a matter, notwithstanding the abolition of the writ of partition.

In re **Printing, Telegraph and Construction Company of the Agence Havas.** *Ex parte* **Cammell,** 1894, 1 Ch, 528. According to the articles of a company, the first directors were allowed a month after

the first general allotment to acquire their qualification, and in case of failure to acquire within that time, the office of director was to be vacated. Cammell took one share and became a director. He never applied for the qualification shares, but without his knowledge they were allotted to him. As soon as he became aware of it, he requested the removal of his name. He did not act as director after the expiration of the one month, although for a short time he was willing and intended to act in the belief that he was still a director. Held he was entitled to have his name removed as he did not actually act as a director. After the expiration of the month, he did not agree to take the shares and he could not be fixed with constructive notice of the fact that his name was on the register.

Saunders v. Sun Life Assurance Company of Canada, 1894, 1 Ch, 537. The defendant company was incorporated in Canada under the name of 'Sunlife Assurance Company of Canada' and had been carrying on business there for more than 10 years; afterwards defendants opened an office in London under the same name. The plaintiff's company which had carried business in England for more than 80 years under the name of "The Sunlife Assurance Society" sued for an injunction against the defendant using their name. Held, that as the defendants had not acquired the name by any fraud or practice, and as it was merely their own corporate name without any variation and not a fancy name, the defendants were entitled to use the name although it might cause inconvenience to the plaintiffs. Held further that the defendants were not entitled to the use of the name "The Sun" or "The Sunlife" without the addition of the words "of Canada."

In re **Harrison. Harrison v. Higson,** 1894, 1 Ch, 561. A testator devised his residuary estate in trust for his four children including Anne Jane Higson the wife of James Higson and declared that his trustees should stand possessed of her share upon trust to invest the same and pay the income to Anne Jane Higson for life and so that 'during any coverture' she should not have power to anticipate the same, and after her death in trust for 'the children or child' of Anne Jane Higson subject to certain conditions. Anne Jane Higson had gone through the ceremony of marriage with James Higson but the marriage was invalid and the testator knew it to be so. Anne Jane Higson had a child by James Higson during the testator's life, and after his death two more children. Held that the child born before the testator's death took the estate as *persona designata.*

Mercantile Investment and General Trust Company v. River Plate, Trust, Loan and Agency Company, 1894 1 Ch, 578. A

purchaser of land is not estopped, under the rule of *res judicata* as being privy in estate by a judgment obtained in an action against the vendor commenced after the purchase. The rule applies though the title of the purchaser may not have been perfected at the time of the former action, by registration. The fact that the vendor defended the former action with the knowledge and approval of the purchaser and even that the latter paid the costs of the vendor's unsuccessful defence in the former action does not affect the question.

Thorneloe *v.* **Hill,** 1894, 1 Ch, 569. The administratrix of one John Forrest a London watchmaker sold his business and good will to one C. and Co., watchmakers in London. The latter three years hence granted the sole right for seven years to put the words 'John Forrest London' the words used by John Forrest to one S. and Co., watchmakers of Liverpool. After the expiration of the seven years C and Co. did not use the inscription except in very few, if any, cases. In 1890 they assigned all their estate for the benefit of creditors. Their trustee sold their business to X and at the same time purported to assign 'the name, title and good will of John Forrest' London to P, the plaintiff The plaintiff sued to restrain a rival watchmaker from selling watches inscribed, "John Forrest, London. Held by *Romer, J.* (1) that the assignment to the plaintiff was merely the right to use the name, unconnected with any business, and was a mere assignment in gross and therefore invalid, (2) that C and Co. lost any right they might have to the inscription by their license to S and Co., and had never regained it.

The Queen *v.* **Lushington.** *Ex parte* **Otto,** 1894, 1 Q. B, 420. In extradition proceedings for theft in France the Magistrate after committing the accused to custody orally ordered a constable to take charge of certain stolen articles, produced by the purchaser as a witness upon a subpœna *duces tecum*, that they may be produced at the trial in France. The purchaser applied to the High Court under 11 and 12 Vic., Ch. 44, S. 5 for an order to the Magistrate to direct the articles to be redelivered to him. Held that as the magistrate was *functus officio* after committal of the accused to prison his order as to the property was not an act relating to the duties of his office and the High Court had therefore no jurisdiction to make the order. Held further, that the purchaser's possessory title to the goods had been lawfully divested by reason of their passing out of his possession under the subpœna and that he was therefore not entitled to the relief.

In re **Bargen.** *Ex parte* **Hasluck,** 1894, 1 Q. B, 444. A bill of sale granted to secure the repayment of principal and interest in weekly

instalments was renewed after bankruptcy of grantor when grantee had no notice of it. Held under the circumstances that the second bill of sale did not operate as a surrender or cancellation of the first bill of sale.

Synge v. Synge, 1894, 1 Q. B, 466. Where the defendant as an inducement to the marriage promised to have a land and house for life to the plaintiff, but after the marriage on the faith of this promise, conveyed the property by deed to a stranger. In an action for damages for breach of contract, held that the plaintiff had an immediate right of action as the plaintiff had put it out of his power to perform the contract and that the measure of damage was the value of the possible life estate to which the plaintiff would be entitled if she survived the defendant. Held also that when a marriage takes place on the faith of a promise to have a defined property by will this court has power to decree a conveyance of that property after the death of the promisor against all who claim as volunteers under him.

Great Western Railway Co. v. Commissioners of Inland Revenue, 1894, 1 Q. B, 507. *Per Lopes, L. J*: It is an establised rule in cases under the Stamp Acts that the substance of the transaction is alone to be looked at in determining the question whether an instrument is liable to stamp duty.

John Foster & Sons v. Commissioners of Inland Revenue, 1894, 1 Q. B, 516. Where all the partners of a partnership desirous of forming themselves into a limited company, transferred the partnership property to a limited company of which they themselves were the shareholders in consideration of stocks and securities of the company held that the transaction was a conveyance on sale chargeable with an *ad valorem* duty.

Musurus Bey v. Gadban, 1894, 1 Q. B, 533. While the ambassador of a foreign state is in England accredited to the sovereign, the statute of limitations does not run against his creditors. The immunity of the ambassador of a foreign state from process in the courts of this country extends for such a reasonable period after he has presented his letter of recall as is necessary to enable him to wind up his official business and prepare for his return to his native country and he is not deprived of the immunity by reason that his successor is appointed before that period has elapsed. The statute does not begin to run against his creditors during such period.

The Queen v. Tankard, 1894, 1 Q. B, 548. When a person received money as one of a member of beneficial owners including himself, but

failed to pay over or to account for it he was rightly held guilty of embezzlement under 31 & 32, Vic, Ch, 116, S. 1.

Farquharson *v.* **Morgan.** 1894, 1 Q.B, 552. When total absence of jurisdiction appears on the face of the proceedings in an inferior court, the court is bound to issue a prohibition although the applicant for the writ has consented to or acquiesced in the exercise of jurisdiction by the inferior court.

Haddow *v.* **Morton,** 1894, 1 Q. B, 565. Goods which had been taken in execution of the judgment of a country court were claimed by a person who deposited the value of the goods with the bailiff to abide the decision of the judge upon the claim. The claim was not established and the money deposited was paid out to the judgment-creditor. The money paid out being insufficient to satisfy the judgment, the judgment-creditor caused the goods to be seized again for the balance. The claimant claimed again and deposited their value under the Act with the bailiff. Upon a second inter-pleader issue, held that by taking out of court the money deposited on the first occasion the judgment-creditor accepted the money in lieu of the goods and thereby estopped himself in respect of the same judgment from denying that as against himself the claimant was the owner of the goods. The claimant was therefore held entitled to judgment.

In the goods of Garnett, 1894, P, 90. A testator executed a document in the presence of attesting witnesses, which contained no bequest and appointed no executor but referred to other papers numbered 1 to 6 not seen by the attestors. Held that documents 1 to 6 were not clearly identified with the description given in the attested paper so as to exclude the possibility of mistake they could not be taken to be uncorporated with such paper and that probate of all the documents must therefore be refused.

In the good of Chappell, 1894, P, 98. A testator appointed as one of his executors "Robert Taylor of Warmley Hill, in the parish of Bitton, bootmaker." There was no Robert Taylor there, but there was a James Alfred Taylor bootmaker living there and it appeared that Robert Britton Taylor, his brother, also a bootmaker lived at Hanham in the same parish. Held, that extrinsic evidence might be received to shew that "James Alfred Taylor of Warmley Hill" was a friend of the testator and that the testator had little acquaintance with "Robert Britton Taylor of Hanham." The court ordered probate to issue to

James Alfred Taylor of Warmley Hill ; *semble*, that evidence of declarations by the testator which tended to shew that he intended James Alfred Taylor and not Robert Britton Taylor, to be his executor was in-admissible.

MISCELLANEOUS.

We beg to acknowledge with thanks the receipt of the following legal publications :—

The Canada Law Journal for April and May (*in exchange*).

The Canadian Law Times for April and May (*in exchange*).

The Green Bag for April and May (*in exchange*)

The Western Law Times for April and May (*in exchange*).

The American Law Review for April and May (*in exchange*).

The Harvard Law Review for April and May (*in exchange*).

Res judicata by Hukm Chand, M.A., Judge, City Court, Hyderabad.

Commentaries on the Specific Relief Act I of 1877 by R. A. Nelson, B.A, LL.B, Principal, Law College, Madras.

Lord Bowen:—It is with deep regret that we record the death of Lord Bowen, which took place early on Tuesday morning at Albert Hall Mansion. The event is accentuated by the fact that he has passed away within a few days of the death of Lord Hannen, whom he succeeded as lord of appeal about seven months ago. He fell a victim to an internal disease, the growth of which caused him frequently to be absent from the Court of Appeal, but the terrible pain of which never caused him, even up to the last hour of his suffering, to lose that serenity of temper which was not the least of the many gifts he displayed. He knew that death was near several days before it came, but 'resignation gently sloped the way,' and he passed away most peacefully. It was a close to a very laborious but singularly calm life, for whatever task he undertook was discharged with the ease and deliberation of the scholar, with a professional dignity which banished all idea of anxiety and haste. Charles Synge Christopher Bowen was born in 1836, being the eldest son of the Rev. Christopher Bowen, of Freshwater, in the Isle of Wight. He has died, therefore, when most judges are fresh to judicial life, but so rapid was his progress in the profession that had he lived until June he would have completed fifteen years of service on the Bench. His professional success had a fitting prelude in his scholastic accomplishments. He distinguished himself at Rugby in play as well as work. He was in the first eleven, was noted among his schoolfellows as a sprinter and hurdle racer, and became a member of the football

team. He was elected captain of the school. The promise of his Rugby days was more than fulfilled by his University achievements, both as a scholar and an athlete. Oxford can claim few more brilliant sons. He carried off the Hertford and Ireland scholarships, and, among several other prizes, he won the Arnold with an essay on Delphi. In 1858 he took a first-class in classical honours, and shortly afterwards became a Fellow of Balliol. He maintained a close connection with his college throughout the remainder of his life. He held the post of visitor, and was on intimate terms of friendship with Dr. Jowett, whose funeral he attended as a pall bearer. Called to the Bar at Lincoln's Inn in 1861, he chose the Western Circuit, on which Lord Coleridge's friendship secured for him an early start in the profession. The construction of his mind was far too subtle, however, to enable him to obtain any striking measure of success in ordinary circuit cases. His real powers were not recognised until, at the instance of Lord Coleridge, then Attorney-General, he was appointed junior counsel to the Treasury in 1870. During the nine following years he lived a most laborious life, his official business and large private practice often compelling him to work almost day and night. Among the cases in which he appeared was the Tichborne trial. With Mr. Chapman Barber, he settled the indictment for perjury, and he played a very active part in preparing the materials for the cross-examination of the claimant's witnesses. His style of speech was too academic to make him an effective advocate in jury cases, but he was recognised as a lawyer of deep and versatile learning, and, when he was appointed a judge of the Queen's Bench Division in 1879, passing straight from the junior Bar to the Bench at the early age of forty-three, his qualifications for the honour were universally acknowledged. His success at Nisi Prius, however, was not great. The trivial facts of ordinary disputes were not worthy of his intellectual strength, and his summings-up were frequently above the heads of the jury. But whenever he allowed free play to his powers of irony, his addresses to the jury were most entertaining. While on circuit, he tried a burglar who had entered the house from the roof and left his boots on the tiles, and who alleged, by way of defence, that he was accustomed to take midnight strolls on the roofs of dwellings, and that he had simply been led by a feeling of curiosity to descend into one of the houses. 'If, gentlemen,' said Lord Bowen to the jury, 'you think it probable that the prisoner considered the roofs of houses a salubrious place for an evening walk—if you suppose that the temptation to inspect the interior of the houses beneath him was the outcome of a natural and pardonable curiosity—in that case, of course, you will acquit him, and regard him as a thoughtful and considerate man, who would naturally

remove his boots before entering the house, and take every precaution not to disturb his neighbours.' He found his true sphere in 1882, when he was promoted to the Court of Appeal, in succession to Lord Justice Holker. During the eleven years he sat as a Lord Justice, he delivered a series of judgments remarkable for the accuracy of their law and the elegance of their diction. No judge has delivered so many brilliant judgments at so early an age. To read them is to learn how closely it is possible to join legal erudition and literary grace. He was equally at ease in hearing common law appeals with Lord Esher, and determining Chancery appeals with Lord Justice Lindley; in whichever branch of the Court of Appeal he sat, his judgments were marked by the same depth of learning, the same knowledge of the evolution of the law, the same lucidity and felicity of phrase. He possessed, too, a firm independence of judgment, which not infrequently caused him to disagree with the conclusions of his learned brethren. Among his most notable judgments were those he delivered in *The North Central Waggon Company* v. *The Manchester, Sheffield, and Lincolnshire Railway Company; Thomas* v. *Quartermaine; Scott* v. *Morley; Boston Deep Sea Company* v. *Ansell; Vagliano Brothers* v. *The Bank of England;* and *Borthwick* v. *The 'Evening Post.'* His wit was certainly not the least attractive of his gifts. Within the last few days many stories have been told of his humour, and although all the caustic sayings attributed to him were not uttered by him, they give some idea of his power of irony, though those who did not hear the gentle voice or observe the modest manner in which they were delivered can have no true notion of their charm. To many it was a matter of regret that one so gifted with literary power should have contributed so little to the literatuare of the country. His contributions consist of 'Virgil in English Verse,' a graceful and scholarly translation; his college essay on 'Delphi'; a powerfully written pamphlet on 'The Alabama Claims,' in which he dealt with the contentions of 'Historicus,' of whom he wrote: 'He borrows legal codes from municipal law and projects them into space'; and the essay on 'Law' he contributed to Mr. Humphry Ward's collection of essays on the Victorian era. His literary labours would, no doubt, have been more numerous if his health had been more robust. For several years he was engaged in a translation of the 'Georgics,' now left unfinished. The qualities which won for him the esteem of the Bar obtained for him the affectionate regard of a large circle of friends. How highly his genial nature and conversational powers were valued in private life was shown by the warm tributes paid to his memory by the Master of the Rolls and Mr. Justice Wright. Among his greatest friends and admirers was Mr. Gladstone, who delighted in his classical learning, and who not very

long ago lunched with Lord Bowen in his room at the Royal Courts of Justice. The confidence he inspired in official and political circles was shown by his appointment as chairman of the Featherstone Commission. He was an excellent after-dinner speaker, the speech he made in proposing the health of Sir Frederick Leighton at the Academy banquet of 1891 being among the most successful of its kind ever delivered in Burlington House. The famous Jackson case, in which the law relating to husbands and wives was dealt with, had first been decided by the Court of Appeal, and this is how Lord Bowen contrived to associate the case with the chief picture of the year: 'I see before me as I address you a great picture of your own which appeals especially to myself as a lawyer It represents Persephone, Queen of Heaven, returning from her husband's to her mother's embraces, released from an unwelcome honeymoon by the special order of the Court of Appeal, to which I have the honour to belong. I am informed on credible authority—but my sight is too indistinct to admit of my verifying the statement—that in the background, although at an extreme distance, may be seen my learned friends, the Lord Chancellor and the Master of the Rolls, looking with pleasure at the liberated captive.' Lady Bowen, whom the late judge married in 1862, is a daughter of the late Mr. James Medows Rendel, and a niece of the newly created baron of that name, through whom Lord Bowen became intimate with the ex-Premier. The legal profession has lost one of the most accomplished and popular men that ever belonged to it, the country has been deprived of the services of a judge who possessed in a rare degree the high qualities most needed on the Bench.

At the sitting of the Court of Appeal on Tuesday the members of both divisions came into Court, including the Master of the Rolls, Lord Justice Lindley, Lord Justice Lopes, Lord Justice Kay, Lord Justice Smith and Lord Justice Davey.—The Master of the Rolls said: I think that the Bar will expect, as the late Lord Bowen was for so many years a member of this Court, that this Court should express that which we know the whole profession feels, the extreme regret and sorrow we all entertain for the terrible loss which we all have just sustained. It is true to say that as Lord Bowen left this Court some few months ago, this Court as a Court has not by this death suffered any special and peculiar loss; we have not lost more than the whole profession has lost. But that loss is so great that we must express what we feel. I cannot have any doubt that Lord Bowen was one of the most distinguished judges who have sat in the Courts of England in my time. His knowledge of the whole law of England was so perfect and so accurate, and

the whole law was so much at his command, that I have no doubt that he had studied every head and particular of English law, not merely when a particular case involving the proposition in question came before him for opinion or advocacy when he was at the Bar, nor when as a judge he had to consider the proposition in his judicial capacity, but he had studied the law minutely and earnestly before ever he was called upon to pronounce an opinion upon it. His knowledge of the law was vast; his power of expressing what the law was you all have experienced often and often. I cannot fail to say that the workings of his mind were so beautifully fine that sometimes what he said escaped me. My mind is not so finely edged. I am more inclined to consider cases and to form my opinions on them in a rougher business manner, and to use rougher business language when dealing with matters of law relating to business. His mind was so beautifully fine and subtle that he delivered perfectly expressed essays upon the law which will be handed down for use by future generations of lawyers. His manner never swerved from a gentle kindness to every one. In private life I did not have the same advantage of knowing him so intimately as did others, some of whom are present here. Still I knew him well. That charming mind and perfection of diction were as great in private life as in Court, and gained for him the admiration and affection of all who knew him. I cannot fail to express my own deep sorrow and regret at the loss which we have sustained, and how that loss can be made up for us I myself cannot see. In uttering these few remarks I speak on behalf of all his late colleagues in this Court, and I think I may and on behalf of all the other judges with whom he was associated in his judicial career.

The Attorney-General said: My Lord,—I feel certain that your lordship has only been fulfilling the expectation of the Bar in uttering the words which you have just spoken. The Bar would have been disappointed if so great a judge as the late Lord Bowen, who had been so long engaged in the administration of justice, had passed away without some reference being made to so sad an event. My lord, the Bar thank you for your kind and sympathetic words. Having myself known him for quite forty years, and having known him intimately for a great part of that time, I would not wish to use language of exaggeration in speaking of the great loss that we have all sustained; but I do not think it any exaggeration to say that the world is poorer by the loss of a great man, the country is poorer by the loss of a great judge—a judge of rare and unique power, and we of the Bar mourn the loss of as genial, kindly, and trusted a friend as ever lived.

In the course of an argument before Mr. Justice Wright, it being understood that a reference to the death of Lord Bowen was being made

in the Court of Appeal, Mr. Justice Wright asked Sir Edward Clarke if he desired to attend there.

Sir Edward Clarke replied that he would not ask the Court to stop the course of business, but he hoped to be allowed to say how deeply the whole Bar lamented the loss of Lord Bowen, and how fully they had always admired his brilliant intellect.

Mr. Justice Wright, in a tone of great emotion, said · I am quite incapable of finding words with which to express what I feel on this occasion. It is in the knowledge of all how gifted, how single-minded. that great judge was, what nobility of character and what modesty he had, though no more subtle and powerful intellect ever adorned the English Bench. In public he fulfilled the highest ideal of justice In his private life—with which I was better acquainted than many others were—I know what kindness, what consideration, characterised his entire life, and with what fortitude he bore sufferings that were known tofew —*Law Journal.*

Lord Hannen:—After a long and painful illness, borne with the fortitude which distinguished him throughout his life, Lord Hannen passed away at his residence at Lancaster Gate on the afternoon of the 26th ult. His health had been in an unsatisfactory condition for many a year. While he was President of the Probate, Divorce, and Admiralty Division, he suffered from a painful malady, which compelled him to undergo an operation. But such was his industry and strength of will that his ill-health did not prevent him from performing his judicial duties with a regularity which few judges have equalled, or from undertaking at the instance of the Government responsibilities of an extra-judicial nature of the highest importance. It was while he was in Paris, as one of the British arbitrators in the Behring Sea inquiry, that the fatal illness first began. For a time the proceedings of the commission were adjourned on account of his indisposition; and, although he enabled the inquiry to be resumed at the earliest possible moment, and played a leading part in bringing about the result of the investigation, his health gradually grew weaker, until he felt compelled to resign the office of Lord of Appeal. Not long before his death his condition appeared to improve, and hopes were again entertained of his recovery, but they were quickly followed by a relapse, from which he never recovered. For a judge Lord Hannen died at a comparatively early age, several occupants of the Bench being more advanced in years. He was born in 1821, his father being a London merchant, who lived at Kingswood, in Surrey. He was educated at St. Paul's School, and completed his studies at the University of Heidelberg, where he acquired his love

of German literature and philosophy. His success in the legal world was due entirely to his own exertions, for his rise at the Bar– to which he was called at the Middle Temple in 1848—was not the result of family influence. For a time he encountered the vicissitudes of the briefless barrister, and occupied his leisure in writing for the press. It was his solid learning as a commercial lawyer which obtained for him a leading position as a junior on the Home Circuit in West-minister Hall. His style of speech was not adapted to what are known as sensational cases, though in the course of his career he appeared in the *Shrewsbury Peerage Case*, and was one of the prosecuting counsel in the trial of the Fenian prisoners at Manchester. As an advocate, all that he aimed at was lucidity, and this quality his speeches preserved in a remarkable manner. While on the bench he cultivated with success a more ornate style of speech. His judgments and summings-up were frequently models of pure and graceful English, and were notable for the number of apt illustrations they contained, and in the felicity of his phrases could be recognised the scholar as well as the judge. For five years Mr. Hannen was junior counsel to the Treasury. He was raised to the Bench in 1868, exactly twenty years after his first appearance in wig and gown. He did not go straight to the Court with which his name is chiefly associated. For four years he sat in the Queen's Bench, where he distinguished himself by the versatility of his learning and the independence of his judgment. It was in 1872 that he became judge of the Probate and Divorce Court. Three years later he was appointed President of the Probate, Divorce, and Admiralty Division. During the sixteen years he held this office he proved himself to be almost the ideal judge for such a tribunal. His knowledge of the law relating to the various sections of the division, his firm grasp of facts, his keen sense of the value of evidence, his painstaking industry and absolute impartiality, his courtesy and dignity—these qualities obtained for him the full confidence of the public and the high esteem of the profession. Perhaps no tribunal is more difficult to preside over than the Divorce Court The character of many of the cases is such that the dignity of the Court is not always easy to maintain; but not once did Sir James Hannen allow it to suffer in his hands. Any attempt at levity on the part of counsel or of witness immediately caused him to assume a severity of countenance which effectually nipped the flippant effort in the bud. It will, however, be his extra-judicial labours which will keep his memory alive longest. The laborious task he began in 1888, as President of the Parnell Commission, and which he performed in a manner in every way worthy of the 'great occassion,' will give his name an enduring place in

the records of our time. Throughout the one hundred and twenty-nine days covered by the inquiry the judgment and bearing of Sir James Hannen were never disputed by the keenest partisan, while the industry and care with which he penned the greater part of the report received a universal tribute of praise. Not less valuable was the service he rendered the country on the Behring Sea Fisheries Commission, the satisfactory settlement of the difficult questions being largely due to his skill in tactics and charming manner. It is a somewhat remarkable coincidence that on the day on which Lord Hannen died Sir Charles Russell moved the first reading of the Behring Sea Bill in the House of Commons, and that within a few hours of his decease Major Le Caron, who played so prominent a part as a witness in the Parnell inquiry, died. He was appointed a Lord of Appeal in 1891, and retired in the Long Vacation of last year. His experience and learning eminently fitted him to sit in the Final Court of Appeal, and one or two of the judgments he delivered displayed his great powers of keen reasoning and lucid exposition, but his opportunities were not numerous enough to enable him to show the full extent of his attainments. A man of simple pleasures, Lord Hannen was fonder of rural than of social life. Most of his holidays were spent at a charming retreat, where he was extremely popular among the humblest of his neighbours. Some thirty years ago Lord Hannen was regarded as an advanced Liberal. He stood for Shoreham in 1865, but his only effort to obtain a seat in the House of Commons was not successful, and probably the result was a fortunate one, because three years later he was raised to the Bench by Lord Beaconsfield, who might not have chosen him had he been sitting in the House of Commons as the representative of a Liberal constituency. Lord Hannen was married in 1847, the year before that in which he was called to the Bar. Lady Hannen died twenty-two years ago.

On Tuesday, the first day of the Easter Sittings, reference was made by the Lord Chief Justice of England, the President (Sir Francis Jeune) of the Probate, Divorce, and Admiralty Division, and by Mr. Justice Barnes, to the death of the late Lord Hannen.

The Lord Chief Justice said that if there had been a greater English judge during the seventy-three years of his life than Lord Hannen it had not been his good fortune to see him. That he was a man of great ability, of remarkable learning, of intellect, strong, capacious, and of penetrating power; that he was a man of inflexible integrity and stainless honour—this the whole country knew. But the whole country did not know, perhaps, that it was left with those who were blessed with his

friendship to discover his warm heart, his steadfast kindness, his generous judgment, his rare consideration for the feelings of others, and his perhaps very moderate estimate of his own powers. Without going beyond the limits of good taste, he (the Lord Chief justice) might raise for one moment the veil of sacred friendship, and say that he had known Lord Hannen for fifty years, ever since they were students at the Middle Temple together, and that in his case at least respect deepened into reverence and regard into love.

Sir Francis Jeune, before a very full Bar, said he felt that he could not commence the work of these sittings without paying a tribute to the memory and honour of the Great judge who had recently died. For nineteen years Lord Hannen was associated with the legal business which was now intrusted to this division. During that time Lord Hannen gave many judgments which had become landmarks in the law, and which were couched in that accurate and dignified language of which he was a complete master. But, speaking in the presence of those who knew him, he ventured to say that his fame was even more secure, at all events by reason of his careful, independent, and decorous administration of justice day by day. Nor were his public services confined to these courts. . When Parliament constituted a tribunal, unprecedented in character, investing it with much of the powers of the common law, and asked for judgment on the conduct of many members of the House of Commons, he believed it was the choice of the country, no less than that of Parliament, which summoned him to preside over that tribunal. Almost at the close of his career the highest authorities appealed to him, and not in vain—appealed to his indefatigable industry, which even failing health could not impair, to his mature wisdom, and to his charm of manner—to aid in the solution of a serious question of international law, to exemplify and to nurture the principle of international arbitration, and to protect the amity of the two great races of the English-speaking world.

Mr. Justice Barnes said he need scarcely say he was thoroughly in accord with all that had fallen from the lips of the President as to the character and merits of the great judge who had just passed away from them.—*Law Journal.*

Property in letters and Postage-Stamps:—Who is the owner of a stamp when affixed to a letter? The popular answer to the question would probably differ much from the legal, and the legal views as to the ownership of letters and stamps thereon undoubtedly require elucidation to the lay mind. A letter and its envelope belong absolutely to

the writer until posted. For the purposes of a criminal libel the posting is equivalent to a publication of the letter, and, if the letter contains false pretences, the posting would seem to be equivalent to an uttering of the pretence (*Regina* v. *Holmes*, 53 Law J. Rep. M. C. 37; L. R. 12 Q. B. Div. 23), just as in the case of a contract posting of the acceptance of an offer is in most cases an irrevocable act (*Henthorn* v. *Fraser*, L. R. (1892) 2 Chanc. 47). But this determines nothing as to the ownership of the letter. The position of the Postmaster-General is somewhat anomalous. He is at once a carrier of letters for reward and an agent of the Crown. In his first capacity he has a special property in the letters intrusted to him, like any other bailee, and would, but for his position as an officer of State, be liable for all negligence in the carriage of letters. But, inasmuch as he enters into the contract of carriage as an agent for the Crown, he could not at common law be sued for a breach of the contract (*Gidleigh* v. *Lord Palmerston*, 1 St. Tr. (N.S) 1263), and he is protected from any action based on the tortious acts of his officials (*Whitfield* v *Le Despencer*, Cowp. 754), and is within the protection of the Public Authorities Protection Act, 1893, as to acts done or intended to be done under his statutory and other powers. Although from the state of the law he is not liable for the loss of a letter or for refusal to deliver it, he does not thereby become its absolute owner nor rise above the position of a highly privileged monopolist in letter-carrying. It is true that in the days of Sir James Graham, and again during the diverse agitations of the Home Rule movement, charges have been brought against the Post Office of detaining or opening or tampering with letters Such acts, if justifiable at all, must be defended either on specific provisions of the Post Office Acts or upon the right of the Crown and all citizens to detect and defeat criminal undertakings. But it is incorrect to assume that they can be justified because no action can be brought in respect of them, or that because there is no remedy against the Postmaster-General except by interrogatories or motions in Parliament or attacks on his salary, that he is, therefore, absolute owner of letters intrusted to him for carriage. Nor can any argument be based on the fact that the sender cannot recover a letter from the English Post Office—a matter also recently discussed in Parliament. All this comes to is, that there is no right in England to stoppage *in transitu* of a letter, and that the property therein passes out of the sender on his posting it, in the same way as that in a bill of exchange does on its being indorsed and posted (*Ex parte Cote*, L. R. 9 Chanc. App. 32). Whether this arises from the Post Office being the agent of the addressee or from the privileged position of the Department or its existing

rules we cannot say. (The French law on the subject is different. See *Ex parte Cote, ubi supra.*) But this much can be said, that once the letter is delivered the Postmaster's property in it, whether general or special, is absolutely divested, and that the addressee on receiving it becomes the absolute owner of the envelope and the paper on which it is written, and could in a proper case recover them from the sender (*Oliver* v. *Oliver*, 31 Law J. Rep. C. P. 4). But this does not include the right to republish it *urbi et orbi* (*Lytton* v. *Devey*, 1 Times Rep. 41). In other words, the control of the sender ceases on posting, the control of the Postmaster-General during transit is absolute, and, as it would seem, untrammelled by any legal liability *ex contractu*, and the control of the addressee on receipt is absolute as to the material on which the communication is written, but subject to what may be called the sender's right to prevent the publication of the communication itself. There remains a further question, whose is the stamp? Some light on this may be derived from the history of stamps. Until 1840 a large number of letters were franked by privileged persons, and those not so franked, if prepaid, had a Post-office stamp impressed upon them, or the postage was collected on delivery as on a railway parcel. At that date the envelope was not invented, and the frank or mark of prepayment or remark as to the amount to be collected was made upon and formed part of the letter. The Mulready envelopes, when introduced, were a mere substitute for a frank—*i.e.*, in place of the privilege of a few to send letters free through the post, any purchaser of such a cover could frank a letter contained in or written upon it. On the covers a mark was made from which originated the present cancellation stamps, but the ownership of the cover was the same as that of the letter, the two being inseparable; and the same is true of the impressed wrappers and the embossed envelopes now in use. With the introduction of the adhesive postage-stamp other points may perhaps be said to have arisen. The purchaser of such stamps at a post office becomes thereby their owner, and may use them to stamp a letter, to paper a wall, or to decorate a stamp-collection, and, as was lately shown in the *Times*, a very large number of postage-stamps are now printed solely to satisfy the demands of stamp-collectors. But when the purchaser affixes a stamp to a letter and posts it, who has rights in it? We would suggest that by affixing it becomes part of the letter. It is truly evidence of the right of the sender to have the letter forwarded and of the addressee to its delivery without charge, and the postmaster is not entitled to remove it so as to affect the postal rights of sender and addressee, though he may no doubt mark it so as to prevent its use on a second letter (54 & 55 Vict. c. 39, ss. 8, 9). The same was done to the frank of the privileged M.P. of old; yet

no one could contend that the Post Office could cut out, although they might cancel, the frank. The sender has certainly no more ownership in the stamp after posting the letter, whether on the grounds already stated as to the letter or because the stamp is affixed to it and becomes part of it, or because the stamp is the postmaster's agreed acknowledgment of payment for the cost of transit. But the acknowledgment does not thereby pass to the carrier any more than a receipted account passes to the person paid, although a legal correspondent of the *Times* seems to believe that the stamp ceases to be the sender's because he has had money's worth for it. Indeed, if a letter cannot be delivered the Postmaster-General acknowledges the sender's right to it by returning it through the Dead Letter Office, stamp and all. During the transit the Postmaster-General appears to be the statutory bailee of the stamp as of the letter, and to have a special property in the stamp for the purpose of indicting any person offending with respect to it; but before and after the transit he has no rights whatever with respect to a genuine English stamp affixed to a letter, and such a stamp belongs to the purchaser or to the addressee of the letter, unless, indeed, the former does, though we doubt if he can, reserve to himself all rights to the stamp when used; and if an indictment were preferred in which the property was laid on the sender or the addressee, it is more than unlikely that any technical objection could prevail, except, of course, where the offence was one under the Post Office Acts, and the property was of the essence of the offence. There is another way of testing the law—viz., by considering who could proceed against the actual abstractor of a stamp from a letter in transit. That the Postmaster-General could is clear. The Stamp Act, 1891, s. 9, imposes penalties for the fraudulent removal of stamps from letters or their covers, and their subsequent sale, which penalties are specifically stated to be in addition to any other liability incurred by the removal. And we see no difficulty apart from any statutory provision in the Post Office Acts to prevent either addressee or sender from suing for unlawful detention of the letter; indeed, this liability is recognised by judicial authority in *Rowning* v. *Goodchild*, 2 Wm. Bl. 906.—*Law Journal.*

Rights in Corpses.—In whom is vested the property in the body of a deceased husband? Mr. Hannay was asked to decide the question on April 3 by an aggrieved wife. Her husband had left her for seventeen years and had cohabited with another woman. On his death the lawful widow demanded, and the actual consort refused, the surrender of the corpse. Neither appears to have been executor under his will nor to have taken out letters of administration to him. The widow then

invoked the aid of the lawful son, who consulted the magistrate as to whether he was entitled to take the body by force, the partisans of the rival claimant being massed and disposed to resist any attempt to assert the alleged rights of ownership. Mr. Hannay suggested that sentiment should not be pressed so as to lead to a breach of the peace, but did not point out that there is no property in the body of a dead person, but that the person bound by law to bury it has such a right of possession as is necessary for the execution of the duty (*Williams* v. *Williams*, L. R. 20 Chanc. Div. 659). The widow and child in the absence of executors owe such duty to the corpse of a father, and if able to pay for burial are indictable for omitting to discharge the duty (*Regina* v. *Vann*, 21 Law J. Rep. M. C. 39). Consequently, the widow and son were entitled to possession of the body; but inasmuch as that right could not be enforced summarily by the magistrate, it is not a right of any apparent legal efficacy.—*Law Journal.*

Judges interrupting :—In the current number of the *Illustrated Ludgate Magazine* there is the first portion of 'A Chat about the Law Courts' which contains a gossipy account of the judges of the Court of Appeal and of the Chancery Division, and of the leading practitioners at the Equity Bar. A passage dealing with the Socratic methods of the judges of the Court of Appeal ends with a statement as to its merits, which is open to question. 'It is impossible,' we are told, 'for any advocate to make a speech. He is cross examined by the occupants of the Bench, who compete to question him directly a proposition falls from his lips. Having dealt with the inquiries of one judge, he is immediately confronted with the arguments of another, and so on, all through the piece, to the utter destruction of any plan he may have made for the statement of his case. The judges arrive at their decisions without allowing an advocate to finish his sentences.' This description of the ways of Lord Esher and his colleagues is certainly not free from exaggeration, which makes it all the more surprising that the writer should approve of the practice. 'This method of administering the law,' he continues, 'though sometimes annoying to counsel, is beneficial to suitors; for it possesses that great virtue in legal matters—rapidity.' No doubt, in the hands of Sir George Jessel, who was chiefly responsible for the introduction of the Socratic method into the judicial world, it possessed the 'great virtue' referred to; but it may well be doubted whether, taking the Bench as a whole, the practice of constantly interrupting an advocate in the midst of his argument has accelerated the rate at which actions are disposed of.